Supreme Court, U.S.
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No. 95-1219

IN THE

Supreme Court of the United States

October Term, 1995

GEORGE NEWMAN,

Petitioner,

vs.

CONSOLIDATION COAL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A SEAMAN ASSERTING A PERSONAL INJURY CLAIM FOR JONES ACT NEGLIGENCE AND UNSEAWORTHINESS IN SHIPOWNER'S SINGLE CLAIMANT NON-CONCURSUS LIMITATION OF LIABILITY ACTION HAS A RIGHT TO THE JURY TRIAL HE DEMANDED AND AS THE JONES ACT EXPRESSLY PROVIDES?

a. WHETHER A SEAMAN'S CUSTOMARY WAIVER OF RES JUDICATA WHICH WAS INTENDED TO AND DID OBTAIN A JURY TRIAL IN STATE COURT WAIVES HIS RIGHT TO A JURY TRIAL IN THE SUBSEQUENT LIMITATION ACTION WHEN THAT WRITTEN WAIVER NEITHER EXPRESSLY NOR IMPLIEDLY GIVES UP A JURY TRIAL IN THE LATER PROCEEDING?

II. WHETHER UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, A FEDERAL DISTRICT COURT MAY REEXAMINE A JURY'S FACTUAL FINDINGS OF JONES ACT NEGLIGENCE AND UNSEAWORTHINESS?

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PETITION FOR WRIT OF CERTIORARI

Petitioner George Newman respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit to review that court's denial of Newman's Petition for a Writ of Mandamus to and dismissal of his appeal from the August 4, 1995 Order of the United States District Court for the Western District of Pennsylvania.

Petitioner, a seaman ward of the court, was critically injured by his employer's negligence and the unseaworthiness of its vessels on April 27, 1989. A Pennsylvania jury found in his favor on November 25, 1991 in Answers to Special Interrogatories. The employer appealed, and Newman cross appealed, those findings through the entire state court appellate system.

The United States District Court for the Western District of Pennsylvania enjoined Newman first from proceeding with the prior state lawsuit and later from collecting his judgment in an ex-parte injunction of which Newman and his attorney had no prior notice or opportunity to be heard. The Court of Appeals denied without opinion Newman's earlier appeal of the modification and continuation of that injunction.

More than six years after Mr. Newman was hurt and nearly four years after the jury verdict in his favor, on August 4, 1995, the District Judge has ordered a complete new trial requiring Mr. Newman to again prove his employer's liability and his damages in a *nonjury* trial. Mr. Newman seeks Certiorari to review those rulings which he contends are unjust, unlawful, and unreasonable.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Third Circuit Dated November 29, 1995 is reprinted in the Appendix at Pages A1-A2. The Denial of Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated December 27, 1995 is reprinted in the Appendix at Page A3.

The District Court's unreported Order of August 4, 1995 is reprinted in the Appendix at Pages A4-A7. The parts of the Order Mr. Newman attacks are the decision to deny Mr. Newman a jury trial and proceed "without a jury." (Appendix at Page A5) and the decision to reexamine the facts found by the state court jury: Claimant's Motion to Adopt the Findings of the Jury as the Findings of the Court (document No. 43) . . . "is DENIED." (Appendix at Page A7).

The District Judge stated in the transcript of July 31, 1995:

> THE COURT: I take it you still contest liability. Is that it?
>
> MR. MILLER (Consol's Attorney): That's correct, Your Honor, and that has been stipulated to.

(Appendix at Page A54).

> THE COURT: Okay, So he (Newman) would still call the same, I take it, medical experts that he has called in State Court to prove his case here.

(Appendix at Page A56).

JURISDICTION

This case involves the denial of a seaman's right to trial by jury. George Newman, Petitioner, seeks a Writ of Certiorari in this Limitation of Liability Act case, 46 U.S.C. §183, to review the November 29, 1995 Order of the United States Court of Appeals for the Third Circuit, Rehearing denied December 27, 1995, dismissing Mr. Newman's appeal for lack of jurisdiction "at this time" and denying his Petition for Mandamus. 28 U.S.C. §1254(1) is the Statute granting this Court jurisdiction of this case:

> **28 §1254. Courts of appeals; certiorari; certified questions**
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> * * *
>
> (As amended June 27, 1988, Pub.L. 100-352, §2(a), (b), 102 Stat. 662.)

The subject of Mr. Newman's appeal and Petition for Mandamus, dismissed and denied respectively by the Court of Appeals, was an August 4, 1995 Order of the United States District Court for the Western District of Pennsylvania, Bloch, J., which ordered a nonjury trial of Petitioner's Jones Act negligence and unseaworthiness claims despite his timely and proper demand for a jury, and a reexamination of the factual findings of the prior state court jury in the seaman's case Mr. Newman brought against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania. Mr. Newman's

objection thereto was set forth in his Motion to Adopt the Facts Found by that jury in the Limitation of Liability case.

The district court had concurrent jurisdiction with the state court of the unseaworthiness and Jones Act claim by statute. That legislation incorporates the Federal Employers' Liability Act, 45 U.S.C. §51 et seq.:

The Jones Act
46 U.S.C. §688

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;

§56 of the FELA confers concurrent jurisdiction on both state and federal courts:

45 U.S.C. §56. Actions; limitations; concurrent jurisdiction of courts

* * *

> The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. (Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.)

Defendants cannot remove Jones Act and FELA cases from state to federal court, 28 U.S.C. §1445(a):

§1445. Nonremovable actions

> (a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

The district court also had jurisdiction of the Limitation of Liability action under 28 U.S.C. §1333(1):

> **§1333. Admiralty, maritime and prize cases**
>
> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases and all other remedies to which they are otherwise entitled.*
>
> * * *

(Emphasis added) Contrary to the district court's legal conclusion (Appendix at page A6), the Saving to Suitors clause accented above is a statutory exception to the exclusive jurisdiction of the federal courts.

The All Writs Act, 28 U.S.C. §1651, invested the United States Court of Appeals for the Third Circuit with jurisdiction over his Petition for Writ of Mandamus to protect Mr. Newman's constitutional right to a jury trial:

> §1651. Writs
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.
>
> (b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (As amended May 24, 1949, c. 139, §90, 63 Stat. 102.)

The right to mandamus to determine questions of entitlement to jury trial has been settled for more than a century. As Justice Holmes wrote in *Matter of Simons*, 247 U.S. 231, 239-240 (1918):

> If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But, as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the district court to proceed and to give the plaintiff her right to a trial at common law.

(Citation omitted) As said in *Beacon Theatres Inc. v. Westover,* 359 U.S. 500, 511 (1959):

> . . . the right to grant mandamus to require jury trial where it has been improperly denied is settled.
>
> * * *
>
> In the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it, nor can it be impaired by any blending with a claim, properly cognizable at law, of a demand for equitable relief in aid of the legal action, or during its pendency.

Id. at 359 U.S. 510 *quoting Scott v. Neely,* 140 U.S. 106, 109-110 (1891). The *Beacon* court reversed the Ninth Circuit denial of mandamus. The Third Circuit's denial of mandamus to a *defendant* asserting a right to trial by jury of his legal defenses to plaintiff's complaint alleging only equitable claims was reversed in *Dairy Queen Inc. v. Wood,* 369 U.S. 469 (1962). That opinion restated "the responsibility of the Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury." *Id.* at 472. Although not a mandamus case, denial of a jury trial by the lower courts to a defendant was reversed in *Tull v. U.S.,* 481 U.S. 412 (1987).

Mandamus will issue to reverse a district court's order that a federal plaintiff's Rule 9(h) Fed.R.Civ.Proc. statement identifying its claim as one in admiralty "extinguished" the defendant's right to trial by jury on its legal counterclaim. *Wilmington Trust v. U.S. Dist. Court for D. Hawaii*, 934 F.2d 1026, 1028 (9th Cir. 1991).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Constitution of the United States of America

"AMENDMENT VII

In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

28 §1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

(As amended June 27, 1988, Pub.L. 100-352, §2(a), (b), 102 Stat. 662.)

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28 U.S.C.

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(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (As amended May 24, 1949, c. 139, §90, 63 Stat. 102.)

The Jones Act
46 U.S.C. §688

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply;

§56. Actions; limitations; concurrent jurisdiction of courts

45 U.S.C.

* * *

The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States. (Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.)

§1445. Nonremovable actions

28 U.S.C.

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

§1333. Admiralty, maritime and prize cases

28 U.S.C.

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

* * *

46 U.S.C. §183(a)

The liability of the owner of any vessel, whether American or foreign, for any embezzlement loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any act, matter or thing, loss damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

STATEMENT OF THE CASE

George Newman, a seaman, was severely injured on April 27, 1989 when a rope broke during the course of his employment as a deckhand with Consolidation Coal Company (Consol), causing him to fall into the empty hold of a coal barge. He filed suit to recover money damages against Consol on January 17, 1990 in the Court of Common Pleas of Allegheny County, Pennsylvania at GD 90-00980. (Claimant's Motion to Dissolve Injunction and to Stay, Appendix A46-47). That lawsuit asserted claims for unseaworthiness and negligence under the Jones Act. Alternatively he sought to recover for negligence under §5(b) of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §905(b) (*Id.*) (Appendix A46).

On July 20, 1990, almost six months after process was served on it, Consol filed suit to Limit its liability in the United States District Court for the Western District of Pennsylvania at C.A. 90-1206. (Docket Entries, Appendix A12). The district court immediately issued an ex-parte injunction forbidding Mr. Newman to prosecute his state court suit. (Docket Entry No. 5, Appendix A14). Mr. Newman's first appearance in the limitation case demanded a jury trial (Appearance, Appendix A45), and the clerk so marked the docket. (Docket Entries, Appendix A12). On January 18, 1991 Mr. Newman moved to vacate or dissolve the injunction and stay. Mr. Newman specifically recited his reliance on the Jones Act, inter alia. (Paragraph one, Claimant's Motion to Dissolve Injunction and Stay, Appendix A46). Paragraph ten of that motion (Appendix, A48) expressly asserted Newman's right to jury trial:

> 10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right

> to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.

The district court required the following stipulation (Appendix A8-9) which was filed (Appendix A50):

> Claimants, George Newman and Suzanne M. Newman, his wife, and their Attorney, Paul L. Hammer, Esquire, hereby stipulate and agree to the following:
>
> 1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the State Court proceeding.
>
> 2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.
>
> 3. The issue of valuation of the limitation fund shall remain an issue to be resolved by the United States District Court for the Western District of Pennsylvania in the case captioned above.

The District judge then modified the injunction to permit Newman to prosecute his action to verdict in state court(Appendix A10-11).

The parties returned to the state court where on November 25, 1991 a jury answered special interrogatories (Appendix A31-32), finding Consol negligent under the Jones Act, its vessels unseaworthy and both were legal causes of Mr. Newman's injuries. The jury further found Newman was negligent to the extent of 11.83% and set his damages at $1,327,000.00

(*Id.*) Consol, not Newman, requested the state trial judge to instruct the jury that it could not be negligent unless Consol knew or should have known of the condition (Consol's Point For Charge No. 10, Appendix A33, 34-35). The state trial judge gave that requested charge (Appendix A35), and the jury found as a fact that Consol was negligent and, therefore, knew or should have known. Consol's main defense in the state court case was that it was not negligent because it was and had been company policy for many years that only the deckhand would inspect its rope and lines (Appendix A37, 40-42). Newman's Motion for Summary Judgment filed January 22, 1991 (Docket Entry No. 25, Appendix A16) remains undecided.

The facts found by the jury in answer to special interrogatories have survived post trial motions, appeal to the Superior Court of Pennsylvania, 652 A.2d 415 (1994) (table) rehearing denied, denial of allocatur by the Supreme Court of Pennsylvania, 659 A.2d 560 (1994) (table), and Mr. Newman's attack on the finding of his negligence in his Petition for Writ of Certiorari to this Honorable Court at 95-240, denied at _____ U.S. _____, 116 S.Ct. 331 (1995).

The parties returned to the district court to litigate the limitation case. Mr. Newman filed a Motion to Adopt the Findings of the State Court jury as the starting facts in the limitation case (Appendix A26-44). Mr. Newman's counsel made clear at a status conference on July 31, 1995 (Appendix A51) that he was not invoking *res judicata* but seeking only to preserve Mr. Newman's rights to jury trial. (Appendix A51-54):

> MR. HAMMER: No, Your Honor. We stipulated that we would not invoke res judicata. That's not why we're here. We're here asking the Court by this motion to do only one thing, and that

> is to take the findings of the State Court jury and then the Court will proceed—as I envision it, this Court will then proceed to go ahead and consider and litigate the question of Consol's rights in the petition that has been filed in the case.
>
> * * *
>
> MR. HAMMER: Well, I think, Your Honor, to protect Mr. Newman's rights under the Seventh Amendment, that to decide this case, Mr. Newman is entitled to have those jury findings given weight by this Court.
>
> THE COURT: Why would I give those jury findings weight as to whether they're entitled to a limitation of liability?
>
> MR. HAMMER: Because if you recall, in a limitation of liability case, it's a split procedure. First Mr. Newman has to establish the liability of the defendant—of Consol, rather, to him. He has proven in State Court that Consol was negligent, its vessels were unseaworthy, that those conditions were the legal cause of his injuries. His injuries are liquidated there in an amount that exceeds the limitation fund. He has proven all of those things. A jury has found them. So once that happens, it then comes to Consol, who bears the burden of proof on this, to prove that they are without privity or knowledge of the conditions that injured Mr. Newman. So my thought—

The court requires Newman to again prove liability (Appendix A55) and damages (Appendix A56). The written order dated August 4, 1995 decreed retrial of all facts and denied Mr. Newman's Motion to Adopt the Jury's facts, finding and ordered a complete new trial *nonjury* (Appendix A4-7).

The Court of Appeals denied Mr. Newman's Petition for Mandamus (Appendix A1-2), claiming an abridgement of Mr. Newman's right to jury trial and objecting to any reexamination of the facts found by the state court jury for that reason (Appendix A24-25). The court also dismissed Mr. Newman's companion appeal from the order of August 4, 1995 for lack of jurisdiction at that time. Rehearing was denied December 27, 1995 (Appendix A3).

Mr. Newman's earlier appeal to the Third Circuit of an order modifying in part and continuing the District Court's injunction against execution of or enforcement of any state court judgment was denied by the Third Circuit without opinion in an order reported at 5 F.3d 1488 (1993) (table).

Consol argued to the district court there was no jurisdiction in admiralty that would entitle Mr. Newman to a jury trial and that Mr. Newman's stipulation waived the right to a jury trial. That court ruled that Mr. Newman had no right to a jury trial because the case was exclusively within the court's admiralty jurisdiction and Mr. Newman had waived any claim to jury trial by his stipulation. In the Mandamus action in the Court of Appeals Consol argued, citing several bankruptcy cases, and the court ruled Mr. Newman had not shown a clear and indisputable right to the writ (Appendix A2).

The case is now before the Supreme Court of the United States on Mr. Newman's Petition for Certiorari to review the rulings of the lower courts. Mr. Newman contends he had a right to a jury trial, the stipulation did not waive that right because it was designed to and did obtain a jury trial, the Seventh Amendment forbids a reexamination of the facts found by the state court jury, and he was entitled to a Writ of Mandamus to protect his right to trial by jury.

REASONS FOR GRANTING THE WRIT

I. Mr. Newman Was Entitled To A Jury Trial On His Jones Act And Unseaworthiness Claims. The Rulings Below Would Unlawfully Deprive Him Of Those Rights And Conflict With The Seventh Amendment, The Jones Act And Decisions Of This Court.

This case is an archetypical jury case. It involves personal injury claims for money damages based on negligence and unseaworthiness. Congress by express language in the Jones Act gave seamen the right to "maintain an action for damages at law, with the right of trial by jury." It has been reversible error for more than thirty years for a district court considering admiralty and Jones Act remedies combined in the same case, as here, to deny the seaman a jury trial. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). The court said:

> Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments. And since Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone.

374 U.S. 21. The district court ordered a *nonjury* trial of all claims on August 4, 1995. Mr. Newman's Jones Act claim was joined with the unseaworthiness action in the same case and he was entitled to a trial by jury on all claims so joined. *Fitzgerald*. Mr. Newman expressly claimed his right to jury trial under the Jones Act in this case and the district court had jurisdiction of the Jones Act claim through §56 of the FELA[1] which Congress

[1] The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

incorporated by reference in the Jones Act. Consol has on the other hand no statutory or constitutional right to a nonjury trial in its admiralty case. Returning again to the language of *Fitzgerald* the court wrote "Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases." 374 U.S. 20.

The district court observed this is a single claimant case (Appendix A5). In single claimant cases the limitation device of a concursus in which the limitation judge adjudicates the litigation of several claimants is not used. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150 (1957):

> Among these sections dealing with the mechanics of effecting such limitation of liability is §184 covering those incidents where "the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of [the claimants]." In that event, the section continues, "they shall receive compensation from the owner of the vessel in proportion to their respective losses; and *for that purpose*" the owners "may take the appropriate proceedings in any court . . ."

See also Gilmore & Black, *The Law of Admiralty* (Second Edition 1975) at page 869:

> The case of the single claim which exceeds the limitation fund presents the opposite situation. There is no need for a concourse, but there is need for limitation. In the single claim case, as in the converse, the case law allowed plaintiff to have his common law action. However, since here there is a need for limitation and since under Supreme Court theory questions of limitations are properly cognizable only in the admiralty court, plaintiff is allowed to proceed outside the admiralty only on condition that he acknowledge defendant's right to

> litigate the question of limitation (as distinguished from his liability on the merits) in the admiralty court.

A plaintiff cannot defeat defendant's right to jury trial on his legal counterclaim by proceeding only in admiralty, as Consol has attempted here. *Wilmington Trust v. U.S. District Court for D. Hawaii, supra,* citing this court's decisions in *Beacon Theatres v. Westover, supra* and *Dairy Queen v. Wood, supra.* In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355 (1962) this court decided the Seventh Amendment preserves the jury trial right of a litigant who has a jurisdictional basis independent of admiralty as does Newman. In *Ellerman* there was diversity. Newman has the concurrent jurisdiction of the Jones Act. See also Billy Coe Dyer, *The Jury on the Quarterdeck: The Effect of Pleading Admiralty Jurisdiction When a Proceeding Turns Hybrid,* 63 Tex. L. Rev. 533, 536 (1984):

> The seventh amendment directive that juries adjudicate most questions of fact is violated when courts allow admiralty procedures to defeat a party's right to a jury trial.

Consol and the trial court have cited the companion cases of *Langnes v. Green,* 282 U.S. 531 (1931) and *Ex parte Green,* 286 U.S. 437 (1932) in an attempt to justify the reexamination of the jury facts and, alternatively, the denial of Newman's demand for a jury in such a putative retrial. That reliance is misplaced. Apart from the obvious distinction that *Langnes/Green* did not even discuss the jury trial issue, *Langnes/Green* held that a *claimant* could not prejudice a shipowner's right to litigate (as opposed to retry the facts found by the jury) the limitation question in federal court. There is no suggestion in *Langnes/Green* that a shipowner is entitled to itself submit a limitation fact issue to the jury and

then subsequently have that jury finding reexamined based upon a claim of self-inflicted prejudice. Another critical distinction between *Langnes/Green* and the case at bar is the fact that those cases were decided more than three decades before the 1966 merger of law and equity in the federal courts. *Langnes/Green* also long predated the judicial recognition of the preeminence of jury verdicts through application of the Seventh Amendment. Significantly, those cases were decided at a time when the circuit courts of appeal heard admiralty appeals *de novo* and the Supreme Court discussed that procedure at length. See *Langnes* at 282 U.S. 536. Subsequently, the jurisdiction of the circuit courts became exclusively appellate. To the extent *Langnes/Green* are relevant, they should be reexamined in the light of modern practice and Seventh Amendment jurisprudence and overruled. No case has yet been cited upholding an argument that a shipowner seeking limitation is unlawfully prejudiced by its own conduct.

The emergence of the preeminent right to trial by jury is apparent in this court's later decisions: *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963) (Lower court's denial of jury trial in action to quiet title summarily reversed citing *Beacon Theatres* and *Dairy Queen*); *Ross v. Bernhard*, 396 U.S. 531, 539 (1970) (Seventh Amendment right to jury trial of legal claims "not forfeited merely because the stockholder's right to sue must first be adjudicated as an equitable issue triable to the court. *Beacon* and *Dairy Queen* require no less"); *Tull v. U.S.*, *supra* (Defendant has Seventh Amendment right to jury trial on legal claim in nonjury suit); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990) (Seventh Amendment forbids use of equitable findings to bar jury trial on legal claim); *Local No. 391 v. Terry*, 494 U.S. 558 (1990) (plaintiff in action for breach of union's

duty of fair representation entitled by Seventh Amendment to jury trial even though cause did not exist at common law when the Constitution was adopted).

If the rulings are permitted to stand, Consol has deprived Newman of his Seventh Amendment rights to jury trial and to not have the jury facts reexamined, his statutory right to a jury trial under the Jones Act, his common law remedies under the Saving to Suitor's clause, 28 U.S.C. §1333(1) and to not have the case removed from state to federal court, 28 U.S.C. §1445(a). Under the paradoxical ruling of the lower court, a seaman may not have his constitutional and statutory rights unless he signs the stipulation; however, if he signs the stipulation, he is not entitled to his constitutional and statutory rights because he has waived them. The shipowner can so deprive the seaman by the single expedient of filing a petition for limitation and exoneration no matter how frivolous.

The manifest intent of Congress cannot be so easily frustrated by a shipowner's unilateral maneuvering. The Limitation Act is not to be transformed "from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights . . ." *Lake Tankers v. Henn, supra,* at 354 U.S. 152.

A. Mr. Newman's Motion To Vacate Or Dissolve Injunction And To Stay (Appendix A46) Expressly Claimed His Seventh Amendment And Jones Act Right To Jury Trial Through The Saving To Suitors Clause of 28 U.S.C. §1333(1). The District Court's Order Of February 1, 1991 Permitted Newman's Claimed Rights And The Jury Returned Its Answers To Special Interrogatories After A Lengthy Trial. Those Findings Have Been Upheld On Appeal. The Stipulation Did Not Waive Any Of Petitioner's Jones Act, Seventh Amendment Or Savings To Suitors Rights.

Newman expresssly invoked the Jones Act, The Seventh Amendment and the Saving to Suitors Clause and claimed his right to trial by jury in paragraphs 1 and 10 of his Motion to Vacate or Dissolve Injunction (Appendix, A46, 48). The stipulation[2] required by the district court (Appendix A8-9) and furnished by Newman (Appendix A50) and the consequent order of February 1, 1991 (Appendix A10-11) do not mention or even refer directly or by implication to any waiver of Newman's right to trial by jury. That order does just the contrary; it grants petitioner's motion to protect his constitutional and statutory rights.

The strong presumption against waiver of the constitutional right to trial by jury is firmly embedded in the decisions of this court:

> "But, as the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver."

Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937). See *Johnson v. Zerbst,* 304 U.S. 458 (1938) (criminal case): " 'courts indulge every reasonable presumption against

[2] The motion and stipulation are in writing so the appellate courts owe no deference to the interpretation of the district court.

waiver 'of fundamental constitutional rights and . . .' [do not] presume acquiescence in the loss' " of such rights. 304 U.S. 464 *quoting Aetna Ins. Co. v. Kennedy, supra.* The nonadmiralty case of *Butler v. Pollard,* 800 F.2d 223 (10th Cir. 1986) involved a claim for damages and for an injunction from the claimed trespass. The parties stipulated the trial judge would decide the injunction issue after the jury trial on damages. The jury found on the facts for the defendants but the trial judge issued the injunction ruling he was not bound by the facts found by the jury because defendants waived their right to jury trial by entering into the stipulation. The Court of Appeals reversed, writing:

> Nothing in this agreement even hints that the defendants agreed to allow determination of the equitable issues in a manner inconsistent with the jury's verdict.

(800 F.2d 225). Mr. Newman directly acknowledged Consol's right to litigate (and restated Newman's right to trial by jury Appendix A52-54) the limitation question in the July 31, 1995 status conference[3] (Appendix A51).

It is the depth of unreason to presume that Newman intended to squander his money, the time and effort expended on this case by Judge McFalls of the state court and his staff over nearly four years, the jurors who spent two weeks hearing and deciding the dispute, the

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[3] A serious question exists as to the good faith basis for the claim of limitation. Consol has insisted, and the uncontradicted evidence shows, management did not inspect the ropes as a matter of corporate policy (Consol's Brief, Appendix A37, 40-42). In that case the corporate shipowner cannot limit its liability. *Kellogg & Sons v. Hicks,* 285 U.S. 502 (1932). In addition Consol, who was not bound by the injunction of July 20, 1990 and amended February 1, 1991, itself submitted the question of its knowledge and privity to the jury in the Jones Act case (Appendix A33, 34-35). The jury's finding of negligence resolved that fact against Consol.

three judges of the Panel of the Superior Court, the fifteen commissioned and one senior judge of Superior Court who considered the Petitions for Reargument, the seven justices of the Supreme Court of Pennsylvania who decided the Petitions for Allowance of Appeal and the Justices of this court who considered and ruled on the earlier Petition for Certiorari. It is equally unreasonable to presume Newman meant to waste the considerable tax money expended and to be spent both by the citizens of Pennsylvania and of the United States, just to give Consol a second bite of the factual apple, when neither it nor the district court have given any reason to indulge in such a wasteful and duplicative procedure, other than the invalid assertion of waiver. Even if there were waiver, there has been no reason good or otherwise stated to retry the entire case. The court's order cited no authority for ignoring the facts found by the jury and Consol has cited no single claimant nonconcursus case where a jury's findings were held irrelevant.

Applying the presumption against waiver of jury trial and other constitutional rights, the terms of the stipulation cannot be a waiver of Mr. Newman's Seventh Amendment rights.

The lower courts erred in ruling to the contrary.

II. The Seventh Amendment Gives Mr. Newman The Right To Not Have The Facts Found By The Jury Reexamined, And The Ruling Of The Lower Court To Do So Conflicts With This Court's Decision In *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 369 U.S. 355 (1962).

The last clause of the Seventh Amendment to the Constitution of the United States (Appendix A61) states:

> "... no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

The answers of the jury to the special interrogatories found inter alia the following facts:

(1) Consol was negligent under the Jones Act
(2) Consol's vessels and line were unseaworthy
(3) Newman was 11.83% negligent
(4) Newman's damages were $1,327,000.00

(Appendix A31-32) Sections I and I A of this petition above demonstrate Newman has Seventh Amendment and Jones Act rights to jury trial which he did not waive.

This court held in the controlling maritime case of *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines* that the Seventh Amendment forbids a reexamination of a jury's answers to special interrogatories in a case involving negligence and unseaworthiness. Like here, the jury in *Ellerman* answered special interrogatories finding negligence, unseaworthiness and setting damages (369 U.S. 357). The jury also found the stevedore did not breach its contractual duty to the shipowner. (*Id.*) The Court of Appeals reexamined and rejected the last jury fact finding. This Court reversed in the following clear language:

> We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States than according to the rules of the common law."
>
> The requirements of the Seventh Amendment were brought into play in this case, even though a stevedoring contract is a maritime contract.

(369 U.S. 358-359) (Footnote omitted).

The fact that the jury sat in state court is irrelevant because the federal court is bound by its findings since the Seventh Amendment applies to cases coming from the state courts into the federal court system. *New York Times v. Sullivan*, 376 U.S. 254, 285 n. 26 (1964). Because of the so called "reverse-*Erie* doctrine,"[4] state courts hearing federal cases must apply federal substantive law, which in Mr. Newman's case was maritime law. The Third Circuit has observed, "[t]he Pennsylvania courts have demonstrated no reluctance in meeting their obligation to follow federal law . . ." *U.S. Steel Corp. Plan for Emp. Ins. v. Musisko*, 885 F.2d 1170, 1178 n. 4 (3rd Cir. 1989).

In *Gorman v. Cerasia*, 2 F.3d 519 (3rd Cir. 1993), the Third Circuit indicated its understanding that the factual findings of the state court jury would apply in the ensuing limitation of liability case in federal court. Chief Judge Sloviter wrote:

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[4] *Erie R. Co. v. Tompkins*, 304 U.S. 62 (1938) requires the application of state substantive law in federal trials heard under the diversity jurisdiction because of the constitutional guarantee of equal protection of the law. Different treatment of similarly situated parties in federal courts from the treatment accorded in state court was held to be a denial of that guarantee.

> Of course, if the *jury in the state proceeding* concludes that [shipowner] acted negligently, it is likely that there will be little, if any, basis upon which he may claim that the accident occurred without his privity or knowledge.

2 F.3d at 529 (emphasis supplied). The stipulation in *Gorman* was much broader than the stipulation Newman was ordered to furnish.

The Court in *Luhr Bros., Inc. v. Gagnard,* 765 F.Supp. 1264 (W.D. La. 1991), also noted that although an admiralty limitation action would proceed after a state court renders judgment for the plaintiff for an amount greater than the limitation fund,

> the admiralty action would proceed in the sense that the admiralty court would be obligated to approve the claim against the shipowner. This would be a mere formality; it would not be necessary to determine the main issues of limitation in this situation.

765 F.2d at 1268 n. 3.

In *Caputo v. U.S. Lines Company,* 311 F.2d 413, 416 (2nd Cir. 1963), the Court held that the verdict by the jury that a longshoreman's injury was caused by a shipowner's failure to properly stow the cargo and furnish dunnage, bound the court which tried the shipowner's third party claim against the stevedore for indemnity. After taking additional expert testimony in opposition to the shipowner's claim for indemnity, the district court found that the accident was due to a latent defect in a packing case. *Id.* The Circuit reversed ruling that "[i]nconsistent determinations based upon the same evidence at the same trial are logically impossible. The court must follow the verdict of the jury." *Id.*

Distinguished judges hearing limitation of liability cases have discussed the difficult constitutional issues Newman has raised that are implicated in the exact procedure Judge Bloch has ordered and have rejected that approach. Leval, J. *Red Star Towing & Transp. Co. v. "Ming Giant"*, 552 F.Supp. 367, 372, 374 (S.D. N.Y. 1982) wrote:

> Since such a trial has already been conducted by the parties before a jury, it seems most appropriate, in service of the principles of *Dairy Queen* (if it is not required as a matter of law), to give effect to the jury trial that has been conducted.

Rubin, J., *Doughty v. Nebel Towing Co.*, 270 F.Supp. 957 (D.C. La. 1967) citing *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) held:

> Therefore, in accordance with the decision in *Dairy Queen, Inc. v. Wood, supra*, it is ordered that plaintiff's motion for a jury trial of the issues raised by the defense of limitation set forth in the answer is granted, but to the following extent only: the issue pertaining to whether any act, matter or thing, loss, damage or forfeiture, was done or incurred for which the defendant is responsible and, if so, whether such act, matter or thing was done with the privity or knowledge of the defendant, being issues to be determined upon substantially the same evidence will be submitted to the jury. In all other respects the motion is denied, and the other issues relative to the limitation of liability claimed by the defendant will be tried by the Court alone, as an Admiralty Court, after the jury arrives at a verdict.

270 F.Supp. at 962 (footnote omitted). *See also* Sofaer, J., *Complaint of Berkley Curtis Bay Co.*, 569 F.Supp. 1491, 1495 (S.D. N.Y. 1983) (where the district court had admiralty jurisdiction over the limitation of or

exoneration of liability claim and jurisdiction under the Jones Act "...[t]he jury was the only proper factfinder").

"Because the district court properly submitted all claims to the jury, its decision rendered as a court in admiralty is superfluous, ..." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 154 (4th Cir. 1995).

Consol relied on *Port of Pasco v. Pacific Inland Navigation Company*, 324 F.2d 593 (9th Cir. 1963). That case did not involve a jury verdict and the Seventh Amendment. The state court findings were made by a trial judge and *not* a jury: "the state action then proceeded to a trial before the court sitting without a jury." (324 F.2d at 595).

There is a practical legal solution to the perceived clash between the seaman's constitutional and statutory rights and admiralty tradition. It should be remembered that the shipowner does not have a right to limitation but instead to litigate its right to limitation in the admiralty court. Every day in courthouses across the country, parties litigate cases where the facts are established as they are here. Judges routinely decide litigation between parties on summary judgments, cases stated, amicable actions, etc. Having the litigation proceed on the facts found by the jury with the limitation judge applying the law to those facts meets the rights of all parties. On the other hand, following the course of the district court in this case does violence to fundamental rights enshrined in the Constitution.

CONCLUSION

The district court decision of August 4, 1995 violates Petitioner's Seventh Amendment and statutory rights and is required by no statute or other law. The procedure ordered will increase litigation, waste scarce judicial resources and public funds at a time when economy in government is essential, and result in unnecessary delay and complication. Adopting the facts already found by the jury will remedy those ills, afford Mr. Newman his rights and is not prohibited by any law. Mandamus should have issued to protect Mr. Newman's right to jury trial.

This Court should grant the Petition for Certiorari and reverse and remand to the Court of Appeals for the Third Circuit with instructions to issue the Writ of Mandamus to the United States District Court for the Western District of Pennsylvania ordering the grant of Mr. Newman's motion to adopt the factual findings of the jury.

Alternatively, if Mr. Newman must retry all his claims over his objections, the writ should issue to enforce his right to the jury trial which he demanded and to which the Jones Act and the Seventh Amendment entitle him.

Respectfully submitted,

LESTER E. ZITTRAIN
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Pittsburgh, Pennsylvania 15219
Telephone: (412) 261-0906

APPENDIX

Denial of Petition for Writ of Mandamus and Dismissal of Appeal by the United States Court of Appeals for the Third Circuit, Dated November 29, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

September 5, 1995
B-18

Nos. 95-3479/95-3491

IN RE: COMPLAINT OF CONSOLIDATION COAL COMPANY

GEORGE H. NEWMAN, *Petitioner-Appellant*
THE HONORABLE ALAN N. BLOCH,
Nominal Respondent
(Related to W.D. (Pittsburgh) of Pa.
Civil No. 90-cv-01206 (ANB))

Present: MANSMANN, SCIRICA and MCKEE,
Circuit Judges.

1. Petition for a Writ of Mandamus in 95-3479.

2. Clerk's submission for possible dismissal in 95-3491 due to a jurisdictional defect.

ANTHONY INFANT
Anthony Infant 597-3137
Deputy Clerk

O R D E R

The foregoing Petition for a Writ of Mandamus in 95-3479 is denied for failure of Petitioner to show a clear and indisputable right to the Writ.

It is further ordered that the appeal at 95-3491 is dismissed because the Court of Appeals does not have jurisdiction at this time.

The stay previously imposed is hereby dissolved.

By the Court,

CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

Dated:
NOV 29 1995
AWI/cc:
JRM PLH Hon. ANB

Denial of Petition for Rehearing of the United States Court of Appeals for the Third Circuit, Dated December 27, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 95-3479 and 95-3491

IN RE: COMPLAINT OF CONSOLIDATION
COAL COMPANY

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA,
COWEN, NYGAARD, ALITO, ROTH, LEWIS, MCKEE
and SAROKIN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

CAROL LOS MANSMANN
Carol Los Mansmann
Circuit Judge

DEC 27 1995

Order of August 4, 1995 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for exoneration from or limitation of liability.

O R D E R

AND NOW, this 4th day of August, 1995, upon consideration of Claimant's Motion to Adopt the Findings of the Jury as the Findings of the Court (document No. 43) filed in the above captioned matter on July 19, 1995, and upon further consideration of Complainant's Response thereto,

IT IS HEREBY ORDERED that said Motion is DENIED.

"The Limited Liability Act [the Act], 46 U.S.C. App. §§181-196, provides that the liability of a shipowner incurred as a result of a maritime accident 'without the privity or knowledge of such owner ... shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.' " *Gorman v. Cerasia*, 2 F.3d 519, 523 (3d Cir. 1993) (*quoting* 46 U.S.C. App. §183(a)). Under the Act, a vessel owner may file a suit in a district court seeking a judgment

exonerating or limiting its liability to a claimant. *In re Midland Enterprises, Inc.*, 886 F.2d 812, 813 (6th Cir. 1989).

Federal courts have exclusive admiralty jurisdiction over suits brought pursuant to the Act, *Langnes v. Green*, 282 U.S. 531, 540 (1931); *In re Midland Enterprises, Inc.*, 886 F.2d at 813, and if a shipowner files a complaint seeking protection under the Act, the district court is authorized to stay all other legal proceedings against the owner. *Gorman*, 2 F.3d at 523. Thereafter, "the district court, sitting in admiralty *without* a *jury*, determines" whether exoneration or limitation of the shipowner's liability is appropriate. *Id.* at 524 (emphasis added).

Nevertheless, where a *single* claimant brings a separate action against a shipowner seeking damages in excess of the value of the owner's vessel, a district court must lift the stay and permit the other action to proceed, but *only* if "the claimant stipulates that the [district] court has exclusive jurisdiction to determine all issues concerning the owner's limitation of liability under the Act." *Id.* As the Court of Appeals for the Third Circuit has stated:

> Specifically, the claimant must waive any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in the state court, and concede the shipowner's right to litigate *all issues* relating to limitation in the federal limitation proceeding. The necessity of these two stipulations has been accepted by federal courts for over half a century and now is beyond dispute.

Id. at 524-25 (emphasis added) (citations omitted).

In this case, the claimant—who as a single claimant had previously been permitted to proceed with a state court action—currently requests that this Court adopt

the findings of the state court jury as the findings of the Court in this limitation proceeding. The claimant raises four arguments in support of his motion. The claimant initially contends that the Seventh Amendment precludes a re-examination of the jury's findings because the claimant is entitled to a jury trial with respect to his Jones Act claim. The claimant next argues that this Court lacks jurisdiction to review the judgment of the state court because only the United States Supreme Court has authority to review judgments of state courts. The claimant continues that considerations of judicial economy preclude relitigation of the issues already decided in the state court proceeding. Finally, the claimant argues that the complainant waived its right to have this Court determine the limitation issues under the Act by litigating these issues before the state court.

The claimant's arguments are unpersuasive. First, it is well-settled that claimants do *not* have a right to a jury trial in limitation proceedings brought under the Act, *see Gorman,* 2 F.3d at 524; *In re Dammaers and Vanderheide and Scheepvaart Maats Christina B.V.,* 836 F.2d 750, 754 (2d Cir. 1988); thus, any argument that this Court is required by Seventh Amendment principles to adopt the state court jury's findings is without merit.

Second, it is also beyond dispute that this Court has jurisdiction to decide *all issues* related to limitation of a shipowner's liability under the Act; in fact, not only does this Court have *jurisdiction* over this matter, it has *exclusive jurisdiction* over limitation issues. *See, e.g.,* 28 U.S.C. §1333; *In re Midland Enterprises, Inc.,* 886 F.2d at 813-14. This Court is not sitting in review of the state court judgment, but it is deciding the limitation issues presented under the Act in the first instance.

Third, considerations of judicial economy do not prevent this Court from deciding the limitation issues presented. The claimant himself requested relief from the stay and was responsible for any delay in the instant litigation. While under existing admiralty law, the claimant clearly had the option to proceed first in state court, the claimant cannot now rely on considerations of judicial economy to prevent this Court from deciding the limitation issues that remain in this case.

Finally, this Court notes that before it could permit the claimant to proceed with its state court action, the claimant was required to stipulate that the complainant "shall have the right to litigate *all issues* relating to its claim of limitation and exoneration of liabilty" before this Court. (Stipulation at ¶2) (emphasis added). Claimant's attempt to have this Court adopt the state court jury's findings for purposes of the limitation proceeding is directly contrary to his own stipulation. In addition, in light of the stipulation, the claimant cannot argue that the complainant waived its right to litigate the limitation issues by proceeding in state court; the complainant undoubtedly relied on the claimaint's stipulation when it agreed to litigate in a different forum.

Therefore, because the claimant has provided the Court with no authority to support its position that the Court should adopt the findings of the state court jury in this limitation proceeding, the claimant's motion is denied.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: James Miller, Esquire
400 Two PPG Place, Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

Order of January 28, 1991 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability.

O R D E R

AND NOW, this 28th day of January, 1991, upon consideration of Claimants' Motion to Vacate or Dissolve Injunction and to Stay filed in the above captioned matter on January 18, 1991, and upon further consideration of Complainant Consolidation Coal Company's response thereto,

IT IS HEREBY ORDERED that the stay imposed by this Court on July 20, 1990, prohibiting further prosecution of all actions against Consolidation Coal Company, the Motor Vessel Elizabeth, or Barge No. MC 1029 shall be lifted to allow further prosecution of the suit filed by George and Suzanne Newman in the Court of Common Pleas of Allegheny County, No. GD 90-00980, upon the filing with this Court of the following stipulations by claimants:

1. that claimants waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding;

2. that Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding; and

3. that the issue of valuation of the limitation fund shall remain an issue to be resolved by this Court.

Complaint of Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 758 (2d Cir. 1988); *Langnes v. Green*, 282 U.S. 531, 540-42 (1931). This Court finds that the stipulations submitted by claimants in their motion do not fully satisfy these requirements. The stay imposed by this Court on July 20, 1990, shall be continued in effect against the entry and consequent enforcement of any judgment obtained in the state court action. Claimants' request that this Court stay the present action is denied.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: Thomas A. Smock, Esquire
Suite 400, Four Gateway Center,
Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

Order of February 1, 1991 of the United States District Court for the Western District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability.

O R D E R

AND NOW, this 1st day of February, 1991, upon consideration of the Stipulation of Claimants and their Counsel filed in the above captioned matter on February 1, 1991,

IT IS HEREBY ORDERED that the stay imposed by this Court on July 20, 1991, prohibiting further prosecution of all actions against Consolidation Coal Company, the Motor Vessel Elizabeth, or Barge Number MC 1029, is hereby LIFTED to allow further prosecution of the suit filed by Claimants, George and Suzanne Newman, in the Court of Common Pleas of Allegheny County at No. GD 90-00980. The stay imposed by this Court on July 20, 1990, is continued in effect against the entry and consequent enforcement of any judgment obtained in the state court action.

AND, it appearing to the Court that no further action is contemplated by this Court at this time,

IT IS HEREBY ORDERED that the Clerk of Court mark the above captioned case closed.

Nothing contained in this order shall be considered a dismissal or disposition of this matter and, should further proceedings in it become necessary or desirable, either party may initiate it in the same manner as if this order had not been entered.

ALAN N. BLOCH
Alan N. Bloch
United States District Judge

cc: Thomas A. Smock, Esquire
Suite 400, Four Gateway Center,
Pittsburgh, PA 15222

Paul Hammer, Esquire
518 Frick Building, Pittsburgh, PA 15219

JST.	FF.	DOCKET NO. YR.	NUMBER	OR	FILING DATE MO.	DAY	YR.	J	NATURE SUIT	DIV.		23	DEMAND IN THOUSANDS	JUDGE	MAG.	COUNTY	JURY DEM.	DOCKET YR.	NUMBER
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PLAINTIFFS

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

DEFENDANTS

CERTIFIED FROM THE RECORD

Date JAN 12 1996
JAMES A. DRACH
By TONYA WILSON

#8 Personal Injury 46 USC 183 et seq.

~~CASE CLOSED~~
Reopened 7-5-95

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

Docket Entries.

A12

ATTORNEYS

Thomas A. Smock, Atty
Polito & Smock, P.C.
Suite 400, Four Gateway Center
Pgh, PA. 15222
392-3500

Paul L. Hammer, Atty
518 Frick Building
Pgh, PA. 15219
For George & Suzanne Newman

James R. Miller, Atty
400 PPG Place
Pgh, PA. 15222
For Consolidated Coal

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS-5	
				JS-6	

UNITED STATES DISTRICT COURT DOCKET

DC-111 (Rev. 8/8

U.S. District Court
Western District of Pennsylvania (Pittsburgh)

CIVIL DOCKET FOR CASE # 90-CV-1206

Filed: 07/05/95
Jury demand: Defendant
Nature of Suit: 340
Jurisdiction: Federal Question

CONSOLIDATION COAL v.
Assigned to: Judge Alan N. Bloch
Demand: $0,000
Lead Docket: None
Dkt# in other court: None

Cause: 46:183 Exoneration, Limitation of Liability

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability *plaintiff*	James R. Miller [COR LD NTC] Dickie, McCamey & Chilcote Two PPG Place Suite 400 Pittsburgh, PA 15222-5402 (412) 281-7272
GEORGE T. NEWMAN *Claimant*	Paul L. Hammer [COR LD NTC] 518 Frick Building Pittsburgh, PA 15219 (412) 261-0907
SUZANNE M. NEWMAN *Claimant*	Paul L. Hammer (See above) [COR LD NTC]

C./A. 90-1206 Complaint of Consolidation Coal Co, et al.

DATE	NR.	PROCEEDINGS
1990		
Jul 20	1	COMPLAINT for exoneration from or limitation of liability and summons issued.
Jul 20	2	NOTICE of complaint for exoneration from or limitation of liability by pltf.
Jul 20	3	STIPULATION for costs by pltf in the sum of $250.00 (Surety—Federal Insurance Co)
Jul 20	4	LIMITATION BOND by pltf (Surety—Federal Insurance Co in the sum of $120,000.00)
Jul 20	5	MOTION for approval of limitation bond and stipulation for costs and for an order directing issuance of the required notice and for issuance of an injunction by pltf & ORDER dated 7-20-90 that said limitation bond and stipulation for costs are granted as stated more fully in order EOD: 7-23-90 Bloch, J. cm: all parties of record.
Jul 25	6	AFFIDAVIT OF SERVICE of mailing the complaint to Atty Paul L. Hammer, George T. Newman, Suzanne Newman and McDonough Marine Service on 7-23-90.
Jul 30	7	APPEARANCE of counsel on behalf of defts George and Suzanne M. Newman by Atty Paul L. Hammer.
Aug 31	8	MOTION to Compel Answers to Interrogatories by Claimants George Newman And Suzanne M. Newman w/proposed order.
Sept. 5	9	NOTICE of filing proof of publication by Complainant Consolidation Coal Company.
Sept. 5	10	HEARING on motion to compel/status conference held before Bloch, J. on 9/5/90; memo filed; Ct Rep—P. Sherman. Discovery

DATE	NR.	PROCEEDINGS
		closes 1/7/91; pltf's pretrial statement is due 1/28/91; deft's pretrial statement is due 2/18/91; pretrial conference set for 3/8/91 at 9:30 A.M.
Sept 7	11	CLAIM by George Newman and Suzanne Newman.
Sept 14	12	ANSWER by defts George Newman and Suzanne Newman.
Oct 1	13	CLAIMANTS' MOTION to increase security w/prop order.
Oct 1	14	MOTION for DEFAULT JUDGMENT by claimant George Newman and Suzanne M. Newman w/prop order.
Oct 2	15	ORDER dated 10-2-90 that claimants' motion is denied to compel answers to interrogatories; that claimant Consolidation Coal Co file a response no later than 10-12-90. EOD: 10-2-90 Bloch, J. cm: all parties of record.
Oct 2	16	ORDER dated 10-2-90 that claimants' motion for default judgment is denied EOD: 10-2-90 Bloch,J. cm: all parties of record.
Oct 3	17	TRANSCRIPT OF PROCEEDINGS of motion to compel held before Bloch, J. on 9-5-90 filed by Official Ct. Reporter Patricia Sherman.
Oct. 12	18	RESPONSE to claimants' motion to increase security by complainant Consolidation Coal Company.
Oct 15	19	NOTICE of Information to Claimants by Claimant Consolidation Coal Co.
1990 Oct. 15	20	OBJECTIONS to Consol's response to claimants' motion to increase security by claimants.

DATE	NR.	PROCEEDINGS
Oct. 16	21	LETTER to counsel of record that a hearing, argument, and taking of testimony on Claimant's motion to increase security and the complainant's response thereto is scheduled for 12/21/90 at 1:30 P.M.
Dec 6	22	NOTIFICATION of possible scheduling conflict by claimants'.
Dec 23	23	MOTION to increase Security hearing held before Bloch, J on 12-21-90 (Rep: Pat Sherman) claimant's motion to increase security is denied with exhibit attached by deft.
1991		
Jan 18	24	CLAIMANTS' MOTION to vacate or dissolve injunction and to stay by George and Suzanne Newman w/prop order.
Jan 22	25	CLAIMANTS' MOTION for summary judgment w/prop order.
Jan. 23	26	ORDER dated 1/23/91 that the opposing party file a reply brief no later than 2/19/91 to motion for summary judgment and brief in support by George Newman and Suzanne M. Newman. EOD: 1/23/91. (Bloch, J)
Jan 25	27	RESPONSE to claimants' motion to vacate or to dissolve injunction and to stay and supporting memorandum of law.
Jan 28	28	PRETRIAL STATEMENT of complainant Consolidation Coal Co.
Jan 29	29	Order dated 1-29-91 that the stay imposed by this Court on 7-20-90 prohibiting further prosecution of all action against Consolidation Coal Co, The Motor Vessel Elizabeth, or Barge No. MC 1029 shall be lifted to allow further prosecution of the suit filed by George and

DATE	NR.	PROCEEDINGS
		Suzanne Newman in the Court of Common Pleas of Allegheny County No. GD 90-00980, upon the filing with this court of the following stipulations by claimants; that claimants waive any claim of res judicata based upon any judgment obtained in the state court proceedings; that Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding; and that the issue of valuation of the limitation fund shall remain an issue to be resolved by this court as stated more fully in order. EOD: 1-29-91 Bloch, J. cm: all parties of record.
Feb 1	30	STIPULATION of claimants and their counsel.
Feb 4	31	ORDER dated 2-1-91 that the Clerk of Court mark the above captioned case closed; nothing contained in this order shall be considered a dismissal or disposition of this matter and should further proceedings become necessary or desirable either party may initiate it in the same manner as if this order had not been entered. EOD: 2-4-91 Bloch cm: all parties of record. NOTICES mailed.
1991		
Feb 11	32	TRANSCRIPT of proceedings held before Judge Bloch on 12-21-90 filed by Official Ct. Reporter Patricia Sherman.
Oct 8	33	NOTICE OF ENTRY OF APPEARANCE by Atty James R. Miller for deft Consolidated Coal Co. with jury trial demand.
Nov 14	34	PETITION by complainant's counsel to withdraw and substitute appearance by petitioner Thomas A. Smock, Esq. w/prop order.

DATE	NR.	PROCEEDINGS
Nov 14	w/34	ORDER dated 11-14-91 that the appearance of Thomas A. Smock, Esq. Leonard Fornella, Esq. and Polito & Smock, P.C. as counsel of record for complainant Consolidation Coal Co is withdrawn and the Clerk is instructed to so mark the docket. EOD: 11-14-91 Bloch, J. cm:all parties of record.
Nov 19	35	COMPLAINANT'S MOTION to modify stay and injunctions w/prop order.
Nov 20	w/35	ORDER dated 11-20-92 that the portion of the stay imposed by this court on 2-1-91, prohibiting the entry upon the docket of any judgment obtained in the state court action is hereby lifted; that portion of the stay and injunction imposed by this court on 2-1-91 is continued in effect against the enforcement of, or execution upon, the judgment obtained in the state court action at Allegheny County Court of Common Pleas GD90-00980. EOD: 11-20-92 Bloch, J. cm: all parties of record.
Nov 25	36	George Newman's Answer to Complainant's Motion to Modify Stay and Injunction with Proposed Order.
Dec 18	37	NOTICE OF APPEAL by George Newman, Claimant from order dated 11-20-91 FF—waived; TPO given.
Dec 18	—	Certified Copy of Notice of Appeal & docket entries, copy of information sheet & ORDER dated 11-20-92 appealed from mailed to USCA; copy of appeal & information sheet to Judge Bloch, deft's counsel; information sheet to appellant claimant; information sheet Ct. Reporter Pat Sherman.
Dec 28	—	NOTICE OF DOCKETING OF APPEAL at 92-3734.

DATE	NR.	PROCEEDINGS
Dec 28	38	TRANSCRIPT PURCHASE ORDER filed by appellant advising that an transcript is unnecessary for the appeal.
Dec 28	—	RECORD complete for appeal purposes, one certified copy of the docket entries to be filed as the certified list in lieu of the record to the USCA.
1993		
Jan 4	—	RECEIPT of receiving one certified copy of the docket entries in the USCA on 12-30-92
Jan 26	39	AFFIDAVIT of Counsel.
1993		
Jan 26	—	RECORD complete for appeal purposes, one certified copy of the docket entries to be filed and the certified list of lieu of the record to the USCA.
Feb 5	—	RECEIPT Of receiving 1st supplement in the USCA on 1-28-93.
Aug 4	40	CERTIFIED Copy of Judgment from the USCA that the judgment of the DC be and hereby affirmed; costs to be taxed against appellant. .
Aug 4	—	RECEIPT for same mailed to the USCA.
1995		
Jun 15	41	CLAIMANT's MOTION to Restore Case to Active Status w/prop order.
Jun 19	42	ORDER dated 6-19-95 that the opposing party file a response no later than 6-29-95 to the motion. EOD: 6-19-95 BLOCH, J cm: all parties of record
Jun 29	43	COMPLAINANT'S Response to Claimant's Motion to Restore Case to Active Status and Request for Status Conference w/prop order.

DATE	NR.	PROCEEDINGS
July 5	w/41	ORDER dated 7/5/95 that claimant George Newman's Motion to Restore Case to the active status is granted. The administrative dismissal of 2/1/91 is vacated and the case shall proceed to final adjudication. EOD: 7/5/95 (BLOCH, J.)
6/15/95	41	MOTION by GEORGE T. NEWMAN to Restore case to active status, with Proposed Order. (tt) [Entry dated 07/05/95]
7/5/95	—	ORDER upon motion granting claimant George Newman's [41-1] motion to Restore case to active status. The administrative dismissal of 2/1/91 is vacated and the case shall proceed to final adjudication. (signed by Judge Alan N. Bloch on 7/5/95) CM all parties of record. (tt)
7/5/95	—	Case reopened (tt)
7/6/95	42	Status Conference set for 3:30 7/31/95 (jad)
7/19/95	43	MOTION by GEORGE T. NEWMAN to Adopt the Finding of the Jury as the Findings of the Court with Proposed Order. (plh)
7/19/95	44	BRIEF by GEORGE T. NEWMAN in support of [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court by GEORGE T. NEWMAN (plh)
7/26/95	45	BRIEF by CONSOLIDATION COAL in opposition to [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court by GEORGE T. NEWMAN (plh)
7/27/95	46	BRIEF by GEORGE T. NEWMAN in support of [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court by GEORGE T. NEWMAN (plh) [Entry date 07/28/95]
8/1/95	47	Status Conference held on 7-31-95 before Judge Alan N. Bloch [Reporter: Marilyn Brown] (plh)

DATE	NR.	PROCEEDINGS
8/1/95	—	Minute entry:, set Pretrial Order Deadlines: Discovery cutoff on 10/2/95; Complainant Consol's Pretrial Statements for Plaintiffs due 11/13/95; Claimant Newman's Pretrial Statements for Defendants due 10/23/95; Pretrial Conference set for 10:30 12/15/95; (plh)
8/2/95	48	TRANSCRIPT of Status Conference before Bloch, J. for dates of 7/31/95. Court Reporter: Marilyn Brown. (plh)
8/4/95	49	ORDER denying [43-1] motion to Adopt the Finding of the Jury as the Findings of the Court. (signed by Judge Alan N. Bloch on 8/4/95) CM all parties of record. (plh)
9/1/95	50	NOTICE OF APPEAL by GEORGE T. NEWMAN, SUZANNE M. NEWMAN from [49-1] order dated 8/4/95 TPO issued. (Filing Fee not paid) (plh)
9/1/95	—	Certified copy of Notice of Appeal [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN, certified copy of docket, certified copy of order mailed to USCA; copy of Notice of Appeal and information sheet to CONSOLIDATION COAL, court reporter(s) Pat Sherman, Marilyn Brown, and Judge. Copy of information sheet to appellant. (plh)
9/15/95	—	USCA Case Number Re: [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN USCA NUMBER: 95-3491 (plh)
10/26/95	51	NOTICE to counsel advising him to filed pltf's pretrial narrative statement by 11-1-95. (plh)
11/1/95	52	Certified copy of ORDER that a temporary stay of proceedings in the district court is granted to enable the Court of Appeals to receive and review an answer to the petition for

DATE	NR.	PROCEEDINGS
		writ of mandamus; the answer, if any, shall be filed with the Clerk of Court by 11-13-95 5:00 p.m., with copies sent to the Chambers of the Honorable Anthony J. Scirica and the Honorable Theodore A. McKee in Philadelphia, Pennsylvania and to the Chambers of the Honorable Carol Los Mansmann in Pittsburgh, PA. received from USCA re: [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN (plh)
12/1/95	53	Certified copy of ORDER received from USCA re: [50-1] appeal by SUZANNE M. NEWMAN, GEORGE T. NEWMAN that the Petition for Writ of Mandamus in 95-3479 is denied for failure of Petitioner to show a clear and indisputable right to the Writ; it is further ordered that the appeal at 95-3491 is dismissed because the court of appeals does not have jurisdiction at this time; the stay previously imposed is hereby dissolved. (plh)
12/4/95	54	MOTION by CONSOLIDATION COAL to Compel Discovery, and to Extend/Reopen Discovery with Proposed Order. (plh)
12/5/95	55	RESPONSE by GEORGE T. NEWMAN to [54-1] motion to Compel Discovery by CONSOLIDATION COAL, [54-2] motion to Extend/Reopen Discovery by CONSOLIDATION COAL (plh)
12/5/95	56	ORDER re: [54-1] motion to Compel Discovery that claimant submit response to Consol's 2nd Interrogatories by 1/5/96, re: [54-2] motion to Extend/Reopen Discovery, and to reset Case Management Order Deadlines: Discovery cutoff to 1/31/96; Pretrial Statements for Claimant due 2/21/95; Pretrial Statements for Complainant

due 3/13/96; Pretrial Conference set for 9:30 4/19/96; (signed by Judge Alan N. Bloch on 12/5/95) CM all parties of record. (rvb) [Entry date 12/06/95]

12/18/95 — Information sheet from USCA advising that a petition for rehearing on behalf of Appellant was filed on 11-13-95. (plh)

12/29/95 — Information sheet from USCA advising that an order was filed on 12-27-95 denying the petition for rehearing. (plh)

1/11/96 57 MOTION by CONSOLIDATION COAL to Compel Discovery with Proposed Order. (plh) [Entry date 01/12/96]

Cover of Petition for Writ of Mandamus and Statement of the Issues Presented

IN THE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-3479

COMPLAINT OF CONSOLIDATION COAL COMPANY AS OWNER OF THE MOTOR VESSEL ELIZABETH and as CHARTERER OF BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

PETITION FOR WRIT OF MANDAMUS OF GEORGE NEWMAN*, CLAIMANT/PETITIONER FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED AUGUST 4, 1995 NOMINAL RESPONDENT, HONORABLE ALAN N. BLOCH CIVIL ACTION NO. 90-1206

PAUL L. HAMMER, ESQUIRE
SUZANNE M. SWAN, ESQUIRE
Attorneys for Claimant
518 Frick Building
Pittsburgh, PA 15219
(412) 261-0906

* Petitioner, a seaman seeking to enforce, inter alia, the Jones Act, 46 U.S.C. §688, is exempt from prepayment of fees and costs by 28 U.S.C. §1916

STATEMENT OF THE ISSUES PRESENTED

1. Is it a violation of the Seventh Amendment for a District Court hearing a single claimant non-concursus limitation of liability case in admiralty to re-examine any facts found by a state court jury in a Jones Act negligence and unseaworthiness case as to either liability and limitation or exoneration of liability issues of both?

2. Does a seaman's stipulation only to "waive any claim of *res judicata* based upon any judgment obtained in the state court proceeding." and that the shipowner "shall have the right to litigate all issues relating to its claim of limitation and exoneration of liability" in the admiralty court waive his Seventh Amendment rights when that subject is not mentioned in the stipulation which was entered into specifically to obtain that jury trial?

3. Assuming, *arguendo,* an admiralty court hearing a limitation of liability case can reexamine facts found by the state court jury, is the seaman entitled to a jury trial on that reexamination, which he properly and timely demanded, in his claim for Jones Act negligence and unseaworthiness pleaded in the limitation case?

Newman's Motion to Adopt the Findings of the Jury as the Findings of the Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration From or Limitation of Liability.

CLAIMANT'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT

AND NOW, comes Claimant, George Newman,* (Mr. Newman) by his attorney, Paul L. Hammer, Esquire, and moves this Honorable Court to adopt the findings of the jury of the Court of Common Pleas of Allegheny County as the findings of this court. In support thereof, Mr. Newman alleges:

1. Complainant, Consolidation Coal Company (Consol) filed this admiralty action to limit its liability, 46 U.S.C. §§181, *et seq*, on or about July 20, 1990, some six months after Mr. Newman filed a tort personal injury action on the grounds of unseaworthiness and Jones Act, 46 U.S.C. §688 *et seq*, negligence against Consol, in the Court of Common Pleas of Allegheny County, Pennsylvania at G.D. 90-00980.

---

* Suzanne Newman was dropped from the case during the state court proceedings.

2. This court modified the injunction and administratively dismissed this action to accommodate Mr. Newman's right to a jury trial in the state court on or about February 1, 1991.

3. The jury found in answers to special interrogatories *inter alia* that Mr. Newman's injuries were the legal result of Consol's negligence and the unseaworthiness of its vessels. In addition, the final judgment set damages in excess of $1,000,000.00. A true and correct copy of the jury's answers to special interrogatories is attached hereto as Exhibit 1.

4. Consol's Request for Jury Instruction No. 8 submitted for the jury's decision the factual finding of what knowledge it had or reasonably should have had. Request No. 8 is quoted here:

> The definition of negligence requires the defendant to only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words, the defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.

A true and correct copy of Consol's Request for Jury Instructions is attached hereto as Exhibit 2.

5. The Honorable Patrick McFalls, the state trial judge, granted Consol's said request for instruction No. 8. He told the jury:

> Definition of negligence requires the Defendant only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words the Defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances. Thus if you find that Plaintiff's injuries occurred as a result of a condition of the line

> which was not known to the Defendant and by exercise of due care would not have been known or known by or reasonably foreseen by the Defendant, you may find Plaintiff has not satisfied his burden of proving negligence on the part of the Defendant regarding the leaving line.

(Transcript, p. 760). A true and correct copy of Judge McFalls' complete charge is attached hereto as Exhibit 3.

6. Consol's privity and knowledge, actual or constructive, have been found as facts by the jury at Consol's own request.

7. The Superior Court affirmed the verdict and the Supreme Court of Pennsylvania denied Petitions for Allowance of Appeal on May 11, 1995.

8. On or about June 29, 1995, Consol conceded:

> Complainant concurs with Claimant in his assertion that, with the exception of issues concerning post-judgment interest and litigation costs relative to the State Court proceeding, said matter is effectively concluded for purposes of the within litigation.

(Complainant's Response to Claimant's Motion to Restore Case to Active Status and Request for Status Conference filed on or about June 29, 1995, page 2.)

9. There is now a state court judgment, which Consol conceded on or about June 29, 1995 is final.

10. A decision to reexamine the facts found by the jury or the judgment of the Pennsylvania courts in this case would necessarily require a determination of the Federal constitutional questions, *inter alia*, listed below.

11. The Seventh Amendment to the Constitution of the United States of America precludes a reexamination

of the facts found by the jury in these circumstances. No court has jurisdiction to redetermine those facts found by the jury.

12. The Pennsylvania judgment is entitled to full faith and credit via Article IV, Section I of the Constitution of the United States of America, which Congress has applied to the Federal Courts, 28 U.S.C. §1738.

13. Consideration of federalism and comity bar an intrusion by the lower federal courts into the judgment of the courts of the Commonwealth of Pennsylvania in this controversy.

14. Additionally, sound judicial economy would not be served by a wasteful second trial on the established facts in this lengthy litigation.

15. No federal court other than the Supreme Court of the United States has jurisdiction to review the judgment of the courts of the Commonwealth of Pennsylvania in this dispute. Hence, this Honorable Court lacks such jurisdiction.

16. Throughout the course of the litigation in state court Consol repeatedly and consistently argued that it did not inspect the rope that failed, causing Mr. Newman's injuries. A true and correct copy of that part of Consol's brief in Support of Its Motion for Post-Trial Relief is hereto attached as Exhibit 4.

17. The rope involved in this case was on the open deck of Consol's vessel and easily could have been inspected.

18. The jury's finding that consol unreasonably failed to inspect the rope involved precludes a contrary finding. Therefore, that fact is established for the purposes of this case.

19. Consol waived the protection of this court's injunction by actually litigating and submitting the knowledge issue to the jury for decision. Consol's claim of lack of privity and knowledge is inextricably intertwined with the merits of the state court judgment and review of the state court's decision is forbidden.

20. A decision to reject the jury's findings in this federal litigation would necessarily deprive Mr. Newman of his right to a jury trial which was the essential purpose for the February 1, 1991 modification of the injunction through application of the "saving to suitors" clause, 28 U.S.C. §1333.

21. Consol is judicially estopped from arguing to this Honorable Court that it reasonably inspected the rope involved after it maintained the opposite position throughout the Pennsylvania courts.

Respectfully submitted,

s/ PAUL M. HAMMER
Paul L. Hammer
Attorney for Claimant

Jury Answers to Special Interrogatories

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. G.D. 90-00980

SPECIAL INTERROGATORIES

GEORGE NEWMAN,

Plaintiff,

vs.

CONSOLIDATION COAL COMPANY,
a corporation,

Defendant.

SPECIAL INTERROGATORIES

1. WAS THERE ANY NEGLIGENCE UNDER THE JONES ACT ON THE PART OF THE DEFENDANT WHICH WAS A CAUSE IN ANY PART WHATSOEVER, NO MATTER HOW SMALL, IN BRINGING ABOUT PLAINTIFF'S INJURIES?

YES ✓ (11) NO ___ (1)

2. WAS THERE ANY UNSEAWORTHINESS OF THE VESSELS OR THE LEAVING LINE WHICH WAS A PROXIMATE CAUSE OF PLAINTIFF'S INJURIES?

YES ✓ (12) NO ___ (0)

IF THE ANSWERS TO QUESTIONS NO. 1 AND NO. 2 ARE "NO", YOU SHOULD NOT PROCEED ANY FURTHER. HOWEVER, IF THE ANSWERS TO EITHER QUESTIONS NO. 1 OR NO. 2 ARE "YES", PLEASE PROCEED TO QUESTION NO. 3.

3. WAS THERE ANY NEGLIGENCE ON THE PART OF THE PLAINTIFF WHICH CONTRIBUTED, IN WHOLE OR IN PART, TO HIS OWN INJURIES?

YES ✓ (10) NO ___ (2)

4. IF THE ANSWER TO QUESTION NO. 3 IS "YES", BY WHAT PERCENTAGE DID THE PLAINTIFF'S NEGLIGENCE CONTRIBUTE TO HIS OWN INJURIES?

11.83%

5. WHAT AMOUNT OF DAMAGES, IF ANY, EXPRESSED IN DOLLARS, DID PLAINTIFF SUSTAIN AS THE RESULT OF THE ACCIDENT ON THE 27TH DAY OF APRIL, 1989?

$1,327,000.00.

FOREPERSON: s/ MARY YVONNE YOCHUM
DATE: November 25, 1991

Excerpts From Consolidation's (Consol) Requests for Jury Instructions in State Court

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No. G.D. 90-00980

Issue No. 141515

Code 009-Trespass-Other

REQUEST FOR JURY INSTRUCTIONS

GEORGE NEWMAN and SUZANNE
M. NEWMAN, his wife,

Plaintiffs,

v.

CONSOLIDATION COAL COMPANY,
a corporation,

Defendant.

Filed on behalf of:
CONSOLIDATION COAL COMPANY,
Defendant

Counsel of Record for this Party:

Leonard Fornella, Esquire
Pa. I.D. No. 27921

POLITO & SMOCK, P.C.
Suite 400 Four Gateway Center
Pittsburgh, PA 15222
(412) 392-3500

REQUEST FOR JURY INSTRUCTIONS

Defendant, CONSOLIDATION COAL COMPANY, requests that the Court include the following instructions in its charge to the jury:

1. Under the law and all the evidence in this case, you must find a verdict against plaintiffs and in favor of defendant.

2. You must consider and determine this case as litigation between persons of equal standing in the community. You should not be influenced or affected by the fact that the defendant is a corporation; nor should you be in any way influenced by any thoughts or ideas you may have as to the financial standing of any party to this litigation. Such matters have no proper place in a case of this kind. This case is to be considered and determined by you in the same unbiased way as you would consider and determine a case between two private individuals of equal standing.

3. Plaintiffs have made a claim against defendant

* * *

[4] defendant, plaintiffs have not satisfied their burden of proving negligence on the part of defendant.

10. There is no evidence in this case that the defendant had any actual and prior knowledge of any condition relating to the line which would have caused it to break. Thus, you must determine whether or not any employee or agent of defendant, other than plaintiff, should have, in the exercise of reasonable care, performed an inspection of the line prior to plaintiff husband's accident. If you find that no employee or agent of defendant, other than plaintiff, had the

opportunity or duty to inspect the line prior to plaintiff husband's use of the line, the condition of the line would not have been anticipated or reasonably foreseen by defendant and you cannot under these circumstances find negligence on the part of the defendant.

11. Even if you find that defendant was negligent, plaintiffs also have the burden of proving that defendant's negligence was a cause of plaintiff husband's accident and injuries.

12. Thus, in order to find defendant liable under plaintiffs negligence claim, you must be satisfied that plaintiffs have met their burden of proving, by a preponderance of the credible evidence, that defendant was negligent and also that defendant's negligence was a cause of

* * *

Excerpt From State Trial Judge's Instructions to the Jury

[760] from the evidence in the case that any negligence of the Defendant contributed in any way toward any damages or injuries suffered by the Plaintiff, you may find that such injury or damage was caused by the Defendant's act or omission. Negligence may be a cause of damage even though it operates in combination with the act of another, some natural cause or some other cause if such other cause occurs at the same time as the negligence and if the Defendant's negligence played any part, no matter how small, in causing such damage.

Definition of negligence requires the Defendant only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words the Defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances. Thus if you find that Plaintiff's injuries occurred as a result of a condition of the line which was not known to the Defendant and by exercise of due care would not have been known or known by or reasonably foreseen by the Defendant, you may find Plaintiff has not satisfied his burden of proving negligence on the part of the Defendant regarding the leaving line. If a preponderance of the evidence does not support the Plaintiff's Jones Act claim for negligence, then your verdict should be for the Defendant on this issue. If,

* * *

Excerpts From Consol's Brief In Support of its Motion for Post Trial Relief in State Court

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

No.

GEORGE NEWMAN and SUZANNE NEWMAN, his wife,

Plaintiffs,

v.

CONSOLIDATION COAL COMPANY,

Defendants.

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION FOR POST-TRIAL RELIEF PURSUANT TO PA. R.C.P. 227.1

I. INTRODUCTION

On November 25, 1991, a jury returned a verdict in favor of Plaintiffs, George and Suzanne M. Newman in the above-captioned matter. On December 3, 1991, Defendant, Consolidation Coal Company, filed post-trial motions pursuant to Pa. R.C.P. 227.1 alleging several points of error including improper jury instructions, the Trial Court's failure to grant Defendant's motion for a mistrial and numerous prejudicial actions by Plaintiff's counsel. Defendant now supplements its motion with the within brief.

The facts of this case can be briefly summarized as follows: The Plaintiff, George Newman was classified as a welder/skilled laborer for the Defendant, Consolidation Coal Company on April 27, 1989. On that date, Plaintiff was working as a deck hand on the Motor Vessel Elizabeth, a vessel owned and operated by the Defendant. Plaintiff was injured when, while

* * *

[16] Defense counsel's opening that relates to this insinuation regarding labor strife. Merely because Defense counsel in his opening gave some background information regarding his client, does not give Mr. Hammer the license to bring up irrelevant and prejudicial information by insinuation. Clearly, this statement was beyond the scope of the evidence presented and was therefore improper. *Rockovitz, supra.*

Mr. Hammer's entire closing argument was designed to depict the Defendant as a bad and horrible company warranting punishment. The statements were prejudicial and therefore warrant a new trial.

E. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY IN ACCORD WITH DEFENDANT'S SUPPLEMENTAL POINTS FOR CHARGE NOS. 5 AND 6 AND IN GRANTING PLAINTIFFS' POINT FOR CHARGE NO. 4.

The next errors alleged by the Defendant in its motion or post-trial relief relate to jury instructions regarding Plaintiff's responsibilities to his employer and Defendant's duty to the Plaintiff. Defendant's supplemental points for charge numbers 1 and 2 relate to Plaintiff's duty to inspect the line that allegedly broke. In this regard, supplemental point for charge number 1 reads as follows:

> The Plaintiff cannot recover on the basis of an unseaworthy condition which is due wholey and solely to a failure on his part to perform the responsibilities that were assigned to him. Therefore, if you find that the rope was an unseaworthy condition and also find that the unseaworthy condition of the rope was due to a failure on Mr. Newman's part to inspect the rope prior to using it, then you must find for the Defendant in this case. *Peymann v. Perini Corp.*, 507 Fed.2d 1318, 1321 (5th Cir. 1974).

[17] Supplemental point for charge number 2 reads as follows:

> If you find that the duty to inspect the rope prior to using it was solely a duty which Mr. Newman owed to his employer to perform, and if you find that the condition of unseaworthiness which was the cause of Plaintiff's accident was due solely to the failure of the Plaintiff to carry out his duty to his employer to inspect the rope prior to using it, then you may find for the Defendant in this case. *Peymann v. Perini Corp.*, 507 Fed.2d 1318, 1321 (5th Cir. 1974). *Walker v. Lykes Bros. S.S. Co.*, 193 F.2d 772 (2d Cir. 1952); *Reinhart v. United States*, 457 F.2d 151 (L9th Cir. 1972); *Buckner v. State Boat Operators, Inc.*, 680 F. Supp. 239 (E.D.La. 1988).

Defendant contends that the Trial Court erred in failing to grant these points for charge.

Additionally, the Trial Court erred in instructing the jury using the Plaintiff's point for charge number 4, which states:

> Consol as a shipowner owed to Mr. Newman as a member of the crew of the vessels employed aboard the vessels the nondelegable duty to keep and maintain the vessels and all gear, tools, and equipment of the vessel in the seaworthy condition at all times.

Plaintiff's Point for Charge No. 4

In failing to grant Defendant's supplemental points for charge number 1 and 2 and in granting Plaintiff's point for charge number 4, the Trial Court failed to recognize the relevant case law regarding the Plaintiff's duty to Defendant, and Defendant's duty to the Plaintiff. A new trial should be granted where the charge of the trial judge does not contain complete instructions on a matter of law which is essential to the jury's proper consideration of the case. *Gnowchoski v. Ardes*, 47 Del. 328 (1960), *aff'd* 402 Pa. 614, 168 A.2d (1960).

[18] As noted previously, Plaintiff brought the present action under the general maritime warranty of seaworthiness and the Jones Act, 46 U.S.C.A. §688. Pursuant to the warranty of seaworthiness, "a ship owner has an absolute and nondelegable duty to furnish a seaworthy vessel and appurtenances that are reasonably safe and fit for their intended use." *Gaddis v. Orgulf Transport, Co.*, 680 F. Supp. 1279, 1282 (S.D. Ill, 1988). Generally, a seamen's contributory negligence will reduce the amount of damages recoverable from the owner, but does not extinguish the seamen's right to recover. *Gaddis*, 680 F. Supp. at 1282. However, an exception known as the "primary duty" doctrine can operate to bar Plaintiff's recovery.

Pursuant the primary duty rule, "a seamen-employee may not recover from his employer for injuries caused by his own failure to perform a duty imposed on him by his employer." *California Home Brands, Inc. v. Ferreira*, 871 F.2d 830, 836 (9th Cir. 1989). In this regard, "the plaintiff must have breached some *positive* duty for the rule to apply . . ." *California Home Brands*, 871 F.2d at 836.

Under the facts of the case at hand, all the witnesses in this case, except one, (the Plaintiff), testified that it was the Plaintiff's responsibility, as a deck hand, to

inspect the line. Timothy Stinson, the pilot of the MV Elizabeth on the day in question, testified that it was the Plaintiff's responsibility to inspect the line before using it. (Trial Record at pp. 157, 159). Indeed, Mr. Stinson testified that it was the deck hand's responsibility to discard old leaving line. (Trial [19] Record at p. 145). The Plaintiff's responsibility, with respect to inspecting the line, related to the fact that as a deck hand he was responsible for untying lines and hooking up barges. (Trial Record at pp. 142, 143). Mr. Stinson also testified that the Plaintiff took the time each day to coil up the leaving line before using it. (Trial Record at pp. 153, 154).

Similarly, Michael Hughes, the assisting operating manager testified that it was the deck hand's responsibility, not management's, to inspect the line. (Trial Record at pp. 204, 105, 218, 229). Indeed, he stated that it was the policy of the Defendant that the deck hand had the responsibility of inspecting the line before using it. (Trial Record at p. 209). The reason this responsibility fell upon the deck hand was because he was the person who must work with the line. (Trial Record at p. 210).

Tom Brown, the general foreman, corroborated with Mr. Stinson's and Mr. Hughes' testimony. In this regard, Mr. Brown testified that it had been the deck hand's responsibility to check the leave lines for 20 years. (Trial Record at pp. 290, 291). Additionally, Mr. Brown added that it was up to the deck hand to tell the foreman that he needed more line. (Trial Record at p. 293).

Warren Dean Orr and Louis Truntich, both employees of the Defendant, also testified that it was the deck hand's responsibility to check the leave lines. (Trial Record at pp. 457, 540).

Only the Plaintiff denied that it was his responsibility to inspect the line. However, in this regard, the [20] Plaintiff acknowledged that he only "glanced at" the lines even though he considered himself to be the best deck hand that the Defendant ever had. (Trial Record at p. 418). Despite admitting that he only "glanced at the lines," the Plaintiff subsequently acknowledged that he never wore gloves so that he could actually feel the line go through his hands to determine whether there were any kind of cuts, burns or other defects in the line. (Trial Record p. 430). He finally acknowledged that it was his responsibility to make sure that he had good line for the barge. (Trial Record at p. 432).

All the testimony summarized above points to one conclusion; the Plaintiff had the primary duty to inspect the line. In this regard, the law is clear in holding that when a seamen is the cause of his own misfortune, he will be barred from recovery. *Gaddis*, 680 F.Supp. at 1282.

Defendant's Supplemental points for charge numbers 1 and 2 address the primary duty rule. The Trial Court refused these instructions. (Trial Record at pp. 695, 706). In light of the above, this was error. The Defendant was entitled to have those instructions read to the jury.

Similarly, the Trial Court erred in granting Plaintiff's point for charge number 4. While at face value this instruction seems a correct statement of the law, in light of the Trial Court's error in refusing to use Defendant's Supplemental points for charge numbers 1 and 2, the Court's instructions were incomplete and, as a result, did not accurately state the [21] applicable law. The primary duty rule is an exception to the nondelegable duty to the Plaintiff. The Trial Court's failure to use the instructions relating to this doctrine mislead the jury.

Thus, the Trial Court committed reversible error when it failed to instruct the jury regarding the primary duty rule. Accordingly, Defendant is entitled to a new trial.

F. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT THE MERE HAPPENING OF AN ACCIDENT IS NOT PROOF OF DEFENDANT'S LIABILITY.

As part of its point for charge, Defendant supplied the Trial Court with the following charge:

> The mere happening of an accident does not make a Defendant liable; nor does it raise any presumption of negligence or fault on the part of a Defendant. Accidents frequently occur through no one's fault. The burden of proof is upon Plaintiff to prove, by a preponderance of the evidence, that the Defendant was negligent and that Plaintiff's injury was causally related to such negligence.

Defendant's Point for Charge No. 13. In ruling on the various charges offered by both parties, the Trial Court refused to use that instruction (Trial Record at p. 708). This was error.

A new trial should be granted where the charge of the trial judge does not contain complete instructions on a matter of law which is essential to the jury's proper consideration of the case. *Gnowchoski v. Ardes*, 47 Del. 328 (1960), *aff'd* 402 Pa. 614, 168 A.2d (1960).

In *Gaddis v. Orgulf Transport Co.*, 680 F. Supp. 1279 (S.D. Ill. 1988) the Court held, in a case based upon the warranty of seaworthiness and the Jones Act that:

* * *

[28] case law, reveals that Defendant's request for a new trial on all issues should be granted.

Respectfully submitted,

DICKIE, McCAMEY & CHILCOTE, P.C.

s/ By JAMES R. MILLER
James R. Miller, Esquire

Attorneys for Defendant,
Consolidation Coal Company

Newmans' Appearance In United States District Court for the Western District of Pennsylvania with Jury Demand

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

JURY TRIAL DEMAND

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

APPEARANCE

TO: Catherine Martrano, Clerk

Please enter my appearance for George Newman and Suzanne M. Newman, his wife, in the above case.

s/ PAUL L. HAMMER
Paul L. Hammer
Attorney for George Newman and Suzanne M. Newman, his wife

Date: 7/26/90

Newmans' Motion to Vacate or Dissolve Injunction and to Stay

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability.

CLAIMANTS' MOTION TO VACATE OR DISSOLVE INJUNCTION AND TO STAY

Claimants, George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered in this case and to stay the prosecution of this case in this Honorable Court. In support thereof, Mr. and Mrs. Newman allege:

1. Mr and Mrs. Newman seek to recover against Consolidation Coal Company under the Jones Act, 46 U.S.C. §688, and for breach of warranty of seaworthiness. Alternatively, Claimants seek to recover for negligence under Section 5(b) of the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §905(b).

2. Mr. Newman suffered severe personal injuries while working on Consol's vessels on or about April 27, 1989.

3. Mr. and Mrs. Newman filed suit against Consolidation Coal Company on January 17, 1990, in the Court of Common Pleas of Allegheny County, Pennsylvania, at GD 90-00980.

4. On or about July 20, 1990, Consol filed this action to limit its liability and obtained that same date an Injunction barring the Newmans from prosecuting their prior action in State Court.

5. In that same Injunction, the Court ordered that all claims must be filed on or before September 15, 1990, or in default thereof such claims be forever barred.

6. The Honorable Court's Injunction was duly and timely advertised by Consol and proof thereof filed.

7. No claimants other than Mr. and Mrs. Newman have appeared. Therefore, this is a single claimant's case, Mrs. Newman's consortium rights being derivative of her husband's.

8. To obtain the Order Mr. and Mrs. Newman now request, Claimants and their counsel hereby stipulate, intending to be legally bound, (1) that this Honorable Court has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman's aforesaid injuries; (2) Mr. and Mrs. Newman and Mr. Hammer also stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation proceeding; and (3) finally, Mr. and Mrs. Newman and Mr. Hammer stipulate that they will confine the Newmans' action to the case pending in the Court of Common Pleas of Allegheny County, Pennsylvania, cited in paragraph 3 above.

9. There will be no prejudice to Consol by the granting of this Motion:

(a) If Consol secures a defense judgment in State Court, the case is over without further requiring any action of this Honorable Court;

(b) If Mr. and Mrs. Newman win a judgment less than the limitation fund in State court, again this Honorable Court will not be required to take any action;

(c) If Mr. and Mrs. Newman obtain a judgment in State Court in excess of the limitation fund, all limitation issues will be decided in this Honorable Court.

10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.

11. The valuable time and assets of this Honorable Court will be conserved if the Newmans' Motion is granted and the Injunction vacated or dissolved and the case stayed. This Honorable Court may well be spared any further proceedings in this case and the case may be removed from this Honorable Court's Docket without further action.

WHEREFORE, Claimants George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered on July 20, 1990, and to stay any further action in this Proceeding until after the termination of the proceedings in the Court of Common Pleas of Allegheny County, Pennsylvania.

Respectfully Submitted,

s/ PAUL L. HAMMER
Paul L. Hammer
Attorney for Claimants

Stipulation of Claimants and Their Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability.

STIPULATION OF CLAIMANTS AND THEIR COUNSEL

Claimants, George Newman and Suzanne M. Newman, his wife, and their Attorney, Paul L. Hammer, Esquire, hereby stipulate and agree to the following:

1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the State Court proceeding.

2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.

3. The issue of valuation of the limitation fund shall remain an issue to be resolved by the United States District Court for the Western District of Pennsylvania in the case captioned above.

s/ PAUL L. HAMMER
Paul L. Hammer
Attorney for Claimants

Transcript of Status Conference
of July 31, 1995

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206
Pittsburgh, Pennsylvania
July 31, 1995, 3:50 PM

CONSOLIDATION COAL COMPANY,
Plaintiff,

vs.

GEORGE T. NEWMAN and
SUZANNE M. NEWMAN,
Defendants.

TRANSCRIPT OF STATUS CONFERENCE
BEFORE HONORABLE ALAN BLOCH,
DISTRICT JUDGE

APPEARANCES:

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Official Reporter:
Marilyn Brown
1025 United States Court House
Pittsburgh, Pennsylvania 15219
Telephone: (412) 355-0687

Proceedings recorded by mechanical stenography.
Transcript produced by computer-aided transcription.

(In the conference room at 3:50 PM
on July 31, 1995.)

THE COURT: This is the date and time we have set for a status conference in the matter of Consolidation Coal vs.—not versus anybody, I guess, for a limitation of liability award at Civil Number 90-1206. I guess the purpose of today's conference is to set a schedule for just where we stand and where we're going from here, and I know that although I haven't looked it over, there was a motion filed to adopt the jury's findings in State Court, and I thought, Mr. Hammer, that we had a stipulation that we weren't to do that.

MR. HAMMER: No, Your Honor. We stipulated that we would not invoke res judicata. That's not why we're here. We're here asking the Court by this motion to do only one thing, and that is to take the findings of the State Court jury and then the Court will proceed—as

I envision it, this Court will then proceed to go ahead and consider and litigate the question of Consol's rights in the petition that has been filed in the case.

THE COURT: Okay. What's your position, Mr. Miller?

MR. MILLER: Your Honor, our position is that there's a stipulation on record signed by Mr. Hammer and approved by this Court which specifically states, number one, that there will be no claim of res judicata based on any judgment obtained in State Court, but in addition, it also states that "Consolidation Coal Company shall have the right to litigate all issues relating to its claim of limitation and exoneration of liability in the present proceeding at the above caption," and we believe we—

THE COURT: Well, isn't what we have to do is just determine whether they have a limitation of liability? And then you can go ahead and do whatever you want with whatever judgment you got in State Court.

MR. HAMMER: Yes, sir.

THE COURT: So I don't have to do anything except determine in this case—

MR. HAMMER: Yes, sir, but—

THE COURT: —the limitation of liability. I don't have to adopt anything.

MR. HAMMER: Well, I think, Your Honor, to protect Mr. Newman's rights under the Seventh Amendment, that to decide this case, Mr. Newman is entitled to have those jury findings given weight by this Court.

THE COURT: Why would I give those jury findings weight as to whether they're entitled to a limitation of liability?

MR. HAMMER: Because if you recall, in a limitation of liability case, it's a split procedure. First Mr. Newman has to establish the liability of the defendant—of Consol, rather, to him. He has proven in State Court that consol was negligent, its vessels were unseaworthy, that those conditions were the legal cause of his injuries. His injuries are liquidated there in an amount that exceeds the limitation fund. He has proven all of those things. A jury has found them. So once that happens, it then comes to Consol, who bears the burden of proof on this, to prove that they are without privity or knowledge of the conditions that injured Mr. Newman. So my thought—

THE COURT: I take it you still contest liability. Is that it?

MR. MILLER: That's correct, Your Honor, and that has been stipulated to.

THE COURT: What did you give up? When you gave up your right that nothing would be res judicata, what were you giving up?

MR. HAMMER: I was giving up the right, which Mr. Newman did not have and could not have, to have a State Court say, "We are determining the right to Consol to limit the liability." The State Court has done no such thing. We didn't ask the State Court to do that.

THE COURT: I don't interpret the stipulation to be limited to that.

MR. HAMMER: May I know how you interpret the limitation, please?

THE COURT: I'm not going to interpret it officially until we go through your briefs, but my impression is that's not what was meant by the stipulation

MR. HAMMER: I was going to—

THE COURT: We're going to issue some kind an order on your motion and we'll deal with the reasoning behind it then, but for purposes of setting a pretrial schedule, I would assume that I'm not going to do that, that I'm not going to adopt the State Court findings. For purposes of setting a schedule, if I decide otherwise, I can modify it.

MR. HAMMER: You will issue an order to that effect?

THE COURT: Sure. I want to give you the chance to go before the Circuit, Mr. Hammer.

Okay. Now let's talk about what we're going to do scheduling wise, and I guess, Mr. Miller, you will be going first. Or I guess it's Mr. Hammer who as the claimant will have to prove liability first.

MR. MILLER: Yes.

THE COURT: What do you have in mind in the way of discovery that you want to conduct?

MR. HAMMER: Your Honor, I don't need any more discovery. We had exhausted your earlier discovery schedule a couple—several years ago.

THE COURT: Mr. Miller, do you have any discovery to complete?

MR. MILLER: Just two items. First of all, Your Honor, I was not counsel of record in the prior limitation action, but from what I can see, there were potentially two areas where there might be a need for discovery.

THE COURT: Okay. Tell me what those are.

MR. MILLER: One, there was an indication before the case was transferred, so to speak, to the State Court that Mr. Hammer was going to supplement some answers to interrogatories. From reviewing the file, I think that may have been with regard to experts. Now in the State Court proceeding, which I did try, Your Honor, he did not produce any experts. So that may be moot.

THE COURT: Okay. Is it?

MR. HAMMER: If you are talking about experts as to the condition of the rope, it is accurate. There were many medical experts.

THE COURT: Okay. So he would still call the same, I take it, medical experts that he has called in State Court to prove his case here. Okay. You don't have to do any discovery about that. I take it you have heard all that.

MR. MILLER: Yes.

THE COURT: Okay.

MR. MILLER: The only other issue, Your Honor, it was raised in response to the limitation complaint by Mr. Hammer that the action was not filed in a timely fashion, and if he continues to assert that defense, then we would like to have the basis for same and any witnesses or the reasoning for it. Because we do believe it was timely filed.

THE COURT: Okay. Are you still maintaining that?

MR. HAMMER: We do, Your Honor, but one of the difficulties is, because discovery had ended, in accordance with the Rules, we had filed—I think back in

January of '91, we had filed in this Court a motion for summary judgment which, because you stayed the case on February 1st of '91, went off in limbo. We think that is now alive again, and I'm reluctant to have discovery opened again—Assuming you're right on the jury findings, I'm reluctant to have discovery opened again after we filed our motion summary judgment.

THE COURT: Well, I don't stop discovery when people file motions for summary judgment.

MR. HAMMER: I think you're supposed to wait until discovery is over before you do it then.

THE COURT: You show me the rule that says that, Mr. Hammer. We regularly continue discovery until it is completed, having nothing to do with any motions, motion to dismiss, motion for summary judgment. It doesn't stop that. And I don't believe that there is any rule that you are citing to that requires that. We want discovery to get over with so that once the motions are decided, we can go right into trial.

So do I understand that there is some discovery you want to do?

MR. MILLER: Yes, sir.

THE COURT: And that's on the statute of limitations question?

MR. MILLER: On the timeliness of the filing of the limitation action.

THE COURT: What do you intend to do on that?

MR. MILLER: I would begin with just interrogatories to see if there is any basis for it. Perhaps some depositions, but nothing extensive.

THE COURT: Is 60 days enough time?

MR. MILLER: It is, Judge.

MR. HAMMER: Your Honor, may I suggest—Let me tell you what the basis for that is, and I think you may conclude that we have been through that heavily. The basis for this was that at the time Mr. Newman was injured, Consol's employees and agents were there. They took him to the hospital. Certain workmen's compensation papers were filed at that time which would have indicated at that time in writing in Consol's files that the claim exceeded the value of the vessels. We have been through all that in production of documents. Mr. Miller was right. He was not counsel while we were doing that. We have been through that with production of documents, we have been through that with I think practically every single one of Consol's employees. Mr. Newman of his own knowledge knows nothing. He got his copy of that warning and doesn't remember anything until he woke up in the hospital a few days later. So I think that discovery is all done, Judge.

THE COURT: He doesn't seem to think it is.

MR. MILLER: I would just like to make sure, Judge, and I think it is more detailed than that, from our position.

THE COURT: Okay. Well, we now have this motion to decide. We now have a summary judgment motion to decide that you say you've already filed.

MR. HAMMER: I'm going to ask the Court when discovery is over for leave then to augment that summary judgment motion, please.

THE COURT: Okay. Does that have to do with this issue that he wants to discover?

MR. HAMMER: It may well.

THE COURT: Okay. Well, then we shouldn't decide the summary judgment motion until discovery is over. Is that what you're saying?

MR. HAMMER: Please.

THE COURT: Okay. Rebecca, we're going to have a 60-day discovery period, and then you will give dates for filing of pretrial statements and for a pretrial conference.

Any supplements to your motion for summary judgment must be filed within 14 days after the close of discovery, accompanied by supporting documents and a brief.

Now she's going to give you dates for filing your pretrial statements and for a pretrial conference.

MS. ROSS: Discovery will close on October 2nd, 1995. The claimant's pretrial statement would be due first?

THE COURT: Yes.

MR. HAMMER: Theirs has already been filed.

THE COURT: They might have to supplement it now.

MS. ROSS: It will be due on October 23rd, 1995.

THE COURT: Claimant's will be due. That's Mr. Hammer's.

MS. ROSS: Mr. Hammer's. The complainant's pretrial statement will be due on November 13. The pretrial conference will be held on Friday, December 15, 1995, at 10:30 AM. That's Friday, December 15, 1995, at 10:30 AM.

THE COURT: Okay. We've already dealt with summary judgment motions. I think that's it. The transcript of this conference is the Order of the Court, and upon request, the reporter will transcribe at the cost of the requesting party.

MR. HAMMER: So requested.

MR. MILLER: Also. Thank you, Your Honor.

(Adjournment at 4:05 PM.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

MARILYN BROWN
Marilyn Brown, Official Reporter

CONSTITUTION

Constitution of the United States of America

"AMENDMENT VII

In suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATUTES

28 U.S.C.

§1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

(As amended May 24, 1949, c. 139, §79, 63 Stat. 101.)

§1445. Nonremovable actions

(a) A civil action in any State court against a railroad or its receivers or trustees, arising under sections 51-60 of Title 45, may not be removed to any district court of the United States.

(b) A civil action in any State court against a common carrier or its receivers or trustees to recover damages for delay, loss, or injury of shipments, arising under section 11707 of title 49, may not be removed to any district court of the United States unless the matter in controversy exceeds $10,000, exclusive of interest and costs.

(c) A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

(d) A civil action in any State court arising under section 40302 of the Violence Against Women Act of 1994 may not be removed to any district court of the United States.

(June 25, 1948, c. 646, 62 Stat. 939; July 25, 1958, Pub.L. 85-554, §5, 72 Stat. 415; Oct. 17, 1978, Pub.L. 95-473, §2(a)(3)(A), 92 Stat. 1465; Oct. 20, 1978, Pub.L. 95-486, §9(b), 92 Stat. 1634; Sept. 13, 1994, Pub.L. 103-322, Title IV, §40302(e)(5), 108 Stat. 1942.

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(As amended May 24, 1949, c. 139, §90, 63 Stat. 102.)

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

(Apr. 22, 1908, c. 149 §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.)

§56. Actions; limitations; concurrent jurisdiction of courts

No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

(Apr. 22, 1908, c. 149, §6, 35 Stat. 66; Apr. 5, 1910, c. 143, §1, 36 Stat. 291; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167; Aug. 11, 1939, c. 685, §2, 53 Stat. 1404; June 25, 1948, c. 646, §18, 62 Stat. 989.)

46 U.S.C. §183(a)

"The liability of the owner of any vessel, whether American or foreign, for any embezzlement loss or destruction by any person of any property, goods or merchandise shipped or put on board of such vessel, or for any act, matter or thing, loss damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

46 U.S.C. §688

* * *

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."[104]

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[104]. 41 Stat. 1007 (1920); 46 U.S. CA. §688.

I. SCOPE OF RULES—ONE FORM OF ACTION

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993.)